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No. 88-____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

QUANTUM CHEMICAL CORPORATION,
Petitioner,

v.

PATRICIA L. PRATT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a federal appeals court violate a defendant's right to trial by jury when it fails to remand to permit jury consideration of the facts in light of new, applicable law which was not contained in the jury instructions but instead independently evaluates the facts and decides the case based upon what a jury "could have" found?

2. When state law, as enunciated by that state's supreme court, changes while an appeal is pending, is a federal appeals court, sitting in diversity, obligated to decide the case in accordance with the new law regardless of the correctness of the judgment below?

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully requests that this Court issue a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered on August 1, 1988, which reversed the judgment notwithstanding the verdict of the United States District Court for the Southern District of Ohio, affirmed the liability portion of the verdict below and reinstated the plaintiff's damages award, with costs and interest.[1]

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[1] Pursuant to Rule 28.1 of the United States Supreme Court Rules, Petitioner Quantum Chemical Corporation provides the following list of its non-wholly owned subsidiaries and affiliates: Battleground Water Distribution Company; Custom Essence Incorporated; Eval Company of America; Quimic S.A. de C.V.; RMI Company; Cetus Corporation; and ND Liquors (UK) Limited.

OPINIONS BELOW

The opinion of the Court of Appeals is contained in the Appendix at (1a).[2] The order of the District Court granting the judgment notwithstanding the verdict is contained in the Appendix at 21a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1988. Quantum's petition for rehearing was denied on September 19, 1988. (24a). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C., § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the right to a trial by jury found in the Seventh Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution. The verbatim text of these provisions is contained in the Appendix at 27a.

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[2] References to the Appendix are cited herein as "____A."

STATEMENT OF THE CASE

Respondent's decedent, Paul Pratt, and a co-worker, Leroy Egan, were injured by an explosion at their workplace, a chemical manufacturing plant owned by petitioner Quantum Chemical Corporation ("Quantum").[3] Both men received benefits from workers compensation for their injuries, but sought additional recovery claiming that Quantum's "intentional" omissions and commissions caused the explosion. The issue is the deprivation of Quantum's right to a jury determination on liability based upon the legal definition of intentional tort as enunciated by the state supreme court.

Paul Pratt's administratrix filed a claim for damages against Quantum in the United States District Court, Southern District of Ohio and claimed, in summary, that Quantum committed an intentional tort by exposing its employee, Paul Pratt, to a risk of harm without fully apprising him of the hazards. Jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332. Leroy and Catherine Egan simultaneously filed their damage action based on identical theories of liability against Quantum in Ohio state court. It is Pratt's suit in federal court that is the basis of this petition. However, the outcome in the *Egan* state court action is relevant to demonstrate the outcome when a jury is properly instructed under Ohio law, as most recently enunciated by the Ohio Supreme Court.

Quantum moved for summary judgment in *Pratt* based upon the fact that Pratt's estate had received workers compensation benefits for the same injuries now claimed to constitute an intentional tort. The United States District Court

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[3] This case was captioned in the district court as *Patricia L. Pratt* v. *National Distillers & Chemical Corporation*. The defendant, National Distillers, was doing business in Cincinnati as Emery Industries. The Sixth Circuit opinion referred to the defendant as "Emery." Since that time, National Distillers changed its name to Quantum Chemical Corporation. The Sixth Circuit subsequently ordered that defendant will hereafter be known as Quantum Chemical Corporation.

granted Quantum's motion and dismissed the complaint. The court held that Mrs. Pratt could not accept workers compensation payments and then later allege that these same injuries were not accidental but rather were intentionally caused by Quantum.

On appeal, the United States Court of Appeals for the Sixth Circuit held the case in abeyance for several months pending resolution by the Ohio Supreme Court of whether an employee may pursue common law claims based upon intentional tort against his employer after having accepted workers compensation. The Sixth Circuit vacated the summary judgment sua sponte and remanded the case for further proceedings in light of *Jones v. VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984), which held, among other things, that an employee could receive workers compensation benefits and pursue an intentional tort claim.

Quantum requested this Court to issue a writ of certiorari to review the Sixth Circuit decision and judgment.[4] The petition to this Court for writ of certiorari was denied. The case subsequently was tried to a jury. The jury found for the plaintiff on liability and awarded $1,003,028 in compensatory damages and $100,000 in punitive damages.

After the verdict, but while post-trial motions were pending, the Ohio legislature passed a new workers compensation statute, Ohio Revised Code § 4121.80. The new statute relegated all damages determinations in intentioanl tort actions between employers and employees to the Ohio Industrial Commission and, by its terms, was made applicable to all pending intentional tort cases. Pursuant to the new statute, the district court vacated the damage award and referred that determination to the Ohio Industrial Commission.

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[4] Quantum argued that the Sixth Circuit improperly permitted plaintiffs to pursue diversity actions in federal courts by contradicting positions taken in state worker's compensation proceedings; and, allowed double recovery to plaintiffs through excessive damage awards to an employee already receiving workers compensation for his injuries.

Both parties then appealed to the Sixth Circuit. While this case was on appeal, and *after* briefing on the merits and oral argument, the Ohio Supreme Court published three more significant decisions in an effort to provide clarity to this highly controversial area of the law: *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 522 N.E.2d 489 (1988); *Pariseau v. Wedge Products, Inc.*, 36 Ohio St. 3d 124, 522 N.E.2d 511 (1988); *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio St. 3d 135, 522 N.E.2d 477 (1988). Quantum's motion to re-argue the case in light of these cases was denied, although an additional memorandum on one aspect of the *Van Fossen* case was allowed.

The Sixth Circuit issued its opinion on August 1, 1988, reversing the district court's judgment notwithstanding the verdict and reinstating the original jury verdict of over $1 million. *Pratt v. National Distillers & Chemical Corp.*, 853 F.2d 1329 (6th Cir. 1988). The court acknowledged that the Ohio Supreme Court had changed the law of employer's intentional tort liability yet proceeded to decide the case in a manner totally inconsistent with the Ohio court's rulings. The Sixth Circuit acknowledged that the Ohio Supreme Court in *Van Fossen* determined that "failure to warn" could no longer constitute an intentional tort, yet it allowed the jury verdict, principally predicated upon a failure to warn theory, to stand. The court chose not to remand the case and opined that the jury "could have" found intent on the part of Quantum based on other evidence in addition to the negligent or inadequate failure of Quantum to warn its employees of a remote explosion hazard associated with a manufacturing process. Quantum thereafter moved for rehearing, but the motion was denied.

In the meantime, the *Egan* case went to trial in state court wherein the jury was charged correctly under *Van Fossen*; verdict was for Quantum.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit in this case has usurped the jury's role and, in doing so, has deprived Quantum of its Seventh Amendment right to a jury trial and Fifth Amendment right to due process. Rather than remanding this case to the trial court in order to allow a jury to perform its fact-finding duty in determining Quantum's intent, and knowledge according to recently decided Ohio law, the federal appeals court invaded the province of the jury and decided this case as if it itself were the jury being instructed in the new Ohio law.

Further, the Circuit court abandoned its proper role sitting in diversity when it decided the issue of intent in conflict with the most recent state supreme court decisions. The Ohio Supreme Court has significantly restricted the basis for an employee's intentional tort claim against the employer. Ohio law now eliminates "failure to warn" and "high risk" as elements in an intentional tort claim and has heightened the standard of proof required to show culpability on the part of the employer. The Sixth Circuit ignored these changes and therefore decided the case in conflict with the Ohio mandate.

The Sixth Circuit invaded the province of the jury by deciding the case as the trier of fact and, further, did not apply the current state law as required by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Vandenbark v. Owen-Illinois Glass*, 311 U.S. 538 (1941).

I. THE SIXTH CIRCUIT'S DECISION HAS UNCONSTITUTIONALLY VIOLATED THE DEFENDANT'S RIGHT TO A TRIAL BY JURY BY INVADING ITS PROVINCE AS TRIER OF FACT AND BY FAILING TO REMAND SO THAT THE JURY MAY BE PROPERLY INSTRUCTED AS TO THE ELEMENTS OF INTENT.

At the core of the Seventh Amendment right is the right to have a jury ultimately determine the issues of fact. *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 268 (6th Cir. 1985). A defendant has a right to the "free and unhampered exercise by the jury of all its powers." *United States v. Argentine*, 814 F.2d 783, 788 (1st Cir. 1987). Safeguards protecting the integrity of the right to trial by jury in civil cases is inherent in the Seventh Amendment and also in the Fifth Amendment's guarantee that no person shall be denied life, liberty or property without due process of law. *See McCoy v. Goldston*, 652 F.2d 654, 657, (6th Cir. 1981); *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3rd Cir. 1965).

The Sixth Circuit in this case, when confronted with the change in relevant Ohio law, chose not to remand the case so that a jury could decide the case under proper instructions, but rather took on the role of jury and decided the facts based on supposition according to what a jury "could" have found. This Court in *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935) (involving an action to recover damages for personal injuries) declared the aim of the Seventh Amendment to be:

> to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.

Id. at 657. Obvious in this case is that the court of appeals disturbed that "common law distinction between the province of the court and that of the jury."

In the recent Supreme Court case of *Boyle v. United Technologies Corp.*, ____ U.S. ____, 108 S. Ct. 2510 (1988) (a diversity action under state tort law), the Court reviewed a Seventh Amendment question concerning a Court of Appeals evaluating facts presented at trial based on a new theory of the government's defense, and not according to the instructions given by the district court to the jury. Because the Supreme Court "was unclear" whether the Court of Appeals was deciding, as a matter of law, that no reasonable jury could have found for the jury under the properly formulated defense or whether the Court of Appeals "was assessing on its own whether the defense had been established," the Court ordered the case be remanded. *Id.* at 2519. The Court reasoned that the "latter . . . would be error, since whether the facts establish the conditions for the defense is a question for the jury." *Id.* The Court stated that if the Court of Appeals was conducting a "factual evaluation", as the petitioner was suggesting, the case must be remanded "for clarification of this point." *Id.*

The present case fits squarely into the latter category that this Court has warned is error. The Sixth Circuit made such a "factual evaluation" when faced with the newly-formulated Ohio common law. The Sixth Circuit examined the defendent's conduct and surrounding circumstances and, on its own, found sufficient evidence to constitute an intentional tort under the *new* Ohio standard.

In its simplest terms, a court "cannot substitute its view for that of the jury when to do so would be an effective denial of the right to trial by jury." *Connell v. Sears, Roebuck & Co.*, 722 F. 2d 1542 (Fed. Cir. 1983) (involving an alleged patent infringement and a claim of fraud). The Sixth Circuit in *United States v. Mentz*, in deciding that a Sixth Amendment right to jury trial has been violated, stated that: "It is not important that the jury might have reached a similar conclusion

had it been given an opportunity to decide the issue under a correct instruction." 840 F. 2d 315, 320 (6th Cir. 1988). *Mentz* found that an improperly instructed jury cannot be cured on appeal by a determination that the jury would not have decided differently with a proper instruction. Similarly in *Glenn v. Dallman*, 686 F. 2d 418 (6th Cir. 1982), the court stated:

> The failure to instruct a jury on an essential element of a crime is error because it deprives the defendant of the right to have the jury told what crimes he is actually being tried for and what the essential elements of these crimes are. This error is not rectified solely because a reviewing court is satisfied after the fact of a conviction that sufficient evidence existed that the jury would or could have found that the state proved the missing element had the jury been properly instructed.

Id. at 421 (citations omitted). The court went on to conclude that the constitutional right to a jury requires that a case must be proven to the jury's satisfaction, "not to the reviewing body's satisfaction." *Id.*

This Court has declared that it is error to "transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." *Bollenbach v. United States*, 326 U.S. 607, 613-614 (1946). The Court in *Bollenbach* warned that it would be "a long jump at guessing" to be confident that a jury did not rely on the erroneous portion of the instruction and that the question is not the guilt or liability that could be derived from the record by a reviewing court, but whether guilt or liability could be found by a jury according to the appropriate precedures and legal standards. *Id.*

Even if the Sixth Circuit's refusal to remand for consideration consistent with the new standard in Ohio should be viewed under a harmless error test, this action could not be judged as harmless. The Sixth Circuit never purported to do a "harmless error" analysis in any event. In determining harmlessness, a reviewing court must decide whether the

error has affected the substantial rights of the parties, or whether the error has been prejudicial to the outcome of the case. *Chapman v. California*, 386 U.S. 18, 22-24 (1966).

The recent Supreme Court decision in *Rose v. Clark*, ___ U.S. ___, 106 S. Ct. 3101 (1986), stands for the rule that "when an instruction prevents the jury from considering a material issue, it is equivalent to a directed verdict on that issue and therefore cannot be considered harmless." *Id.* at 3106. The Court in *Rose v. Clark* stated that in such a case "the wrong entity judged the defendant guilty", thereby rendering the trial fundamentally unfair. *Id; see also Mentz*, 840 F.2d at 324. The Court finds an error not harmless when jury instructions remove a material issue completely from the jury's consideration. 106 S. Ct. at 3107, n.8. In the case *sub judice*, the present standard for determining an intentional tort claim, as enumerated in the Ohio Supreme Court, was not before the jury. The jury instruction under previous Ohio law permitted (indeed, suggested) a finding of intent from a failure to warn.[5] The Sixth Circuit took the issue out of a jury's hands entirely and made a determination whether intent could be inferred from any other circumstances.

Even though the Supreme Court in *Rose v. Clark*, *supra*, was applying its harmless error analysis to a criminal convic-

[5] The jury was instructed by the district court in *Pratt*:

> [a] defendant who *fails to warn* of a known defect or hazard which poses a grave threat of injury may reasonably be considered to have acted, despite a belief that harm is substantially certain to occur. (Emphasis supplied.)

(*Pratt* trial transcript, 2/18/86, pp. 769-70).

By contrast, the state court in *Egan* instructed the jury according to current Ohio law as set forth in *Van Fossen* v. *Babcock & Wilcox Co.*:

> There are many acts within the business or manufacturing process which involve the existence of dangers, where management fails to take corrective action, institute safety measures, or properly warn the employees of the risks involved. Such conduct may be characterized as gross negligence or wantonness on the part of the employer. However, such conduct should not be classified as an "intentional tort."

(*Egan* trial transcript, 9/12/88, pp. 147-48).

tion, federal courts have similarly utilized a directed verdict standard when reviewing a denial of a right to trial by jury under the Seventh Amendment. *See Keller v. Prince George's County*, 827 F.2d 952, 954-55, (4th Cir. 1987); *In re N-500L. Cases*, 691 F.2d 15, 25 (1st Cir. 1982). Therefore, such denial can only be harmless when the evidence is such, without weighing the credibility of the witnesses, that there is only one conclusion that reasonable jurors could have reached. *See, e.g., Wheatley v. Gladden*, 660 F.2d 1024, 1027 (4th Cir. 1981). Similarly, the court in *Roscello v. Southwest Airlines Co.*, 726 F.2d 217 (5th Cir. 1984), when confronted with a Seventh Amendment denial of right to trial by jury, stated:

> Having concluded that Roscello was entitled to a jury trial under the Seventh Amendment to the Constitution, we have proceeded to examine whether denial of that right was harmless error. Although the question may be a close one, close cases are precisely those that our system most readily entrusts to a jury. Whatever view of the evidence we might have taken ourselves, we must avoid usurping the function of the jury by weighing evidence and judging credibility. . . .

Id. at 224-25 (citations omitted). The court in *Roscello* concluded that there was sufficient evidence in the record from which reasonable people *might* draw *differing* conclusions, and remanded for a new trial.

The Sixth Circuit, however, did not use the appropriate standard of review as stated above but rather reviewed the verdict from a sufficiency of the evidence standard and, in affirming the jury verdict, held that there was "sufficient evidence that a reasonable jury *could find* that defendant's acts, including but not limited to its failure to warn, constituted an intentional tort." *Pratt*, 853 F.2d at 1339 (emphasis added). Based on the modification in Ohio law, the Sixth Circuit should have asked the question whether under proper instructions, "reasonable people might have concluded differently." *Roscello*, at 224-25. In the *Egan* case, with the

benefit of a proper instruction, the reasonable men and women of the jury did in fact "conclude differently" under the new, modified Ohio law.

Leroy Egan, Pratt's fellow employee who was injured in the explosion, brought a similar claim for intentional tort against Quantum. The theories of liability were the same in both cases. Of critical importance is the fact that the jury in *Pratt* was instructed under old Ohio law and the jury in *Egan* was instructed under the law as it had recently changed. Most significantly, the instruction under the new law eliminated failure to warn as an element of an intentional tort. The jury in *Pratt* found for the plaintiff; the jury in *Egan* found in favor of Quantum.

Of particular concern in this case is the fact that not only did the appeals court usurp the role of the jury in its fact-finding process but did it in the domain where a jury is most uniquely suited — in the area of intent. The Ohio Supreme Court in *Blankenship* v. *Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572, *cert. denied*, 459 U.S. 857 (1982), also involving an alleged intentional tort in the workplace, stated that the determination of intentional conduct must rest with the trier of fact. In a correlative situation where criminal intent must be established, this Court has held:

> To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when a jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made.

Connecticut v. *Johnson*, 460 U.S. 73, 86 (1983). "The harmless-error doctrine may enable a court to remove a taint from proceedings in order to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings." *Pope* v. *Illinois*, 107 S. Ct. 1918, 1925 (1987) (Brennan, J., dissenting).

II. THE SIXTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE LAW OF THE STATE AT THE TIME THE COURT, SITTING IN DIVERSITY, RENDERED ITS DECISION.

Within months after the Ohio Supreme Court had spoken on the issue of an employee's claim of intentional tort in the workplace, the Sixth Circuit undercut those pronouncements by interposing its own independent determination, clashing with state law. The impact of the Sixth Circuit's decision in this case will be to thrust conflict and confusion into an area where the state supreme court had made great strides in setting standards.

The mandate of this Court is clear that a federal court exercising jurisdiction over tort cases on the ground of diversity of citizenship must apply the law of the state, as declared by its highest court. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1937). It has also been established by this Court that a federal court of appeals must conform its judgment to the law of the appropriate state at the time the federal appeals court renders its decision. *See, e.g., Vandenbark* v. *Owens-Illinois Co.*, 311 U.S. 538 (1941); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969). There has been a difference in Court opinion as to the effect given to decisions by lower state courts, but it remains undisputed that when the supreme court of the state has articulated the law of the state, it must be followed in diversity actions. *King* v. *Order of United Commercial Travelers*, 333 U.S. 153, 158 (1957); *see also Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1966) ("a State's highest court is the best authority on its own law"). The *Vandenbark* Court quoted Chief Justice Marshall's explanation of the rule for federal appellate courts when there is a change of state law subsequent to the judgment of the district court:

> It is, in the general, true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the

> judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied.

311 U.S. at 541, quoting *United States* v. *Schooner Peggy*, 5 U.S. 103 (1801). The rule applies whether the change in state law is constitutional, statutory, or judicial. *Thorpe*, 393 U.S. at 282. What better voice than the highest state court establishing its own laws and policies of state interest for its citizens. And what better interpretor of state law as it exists than a state's own high court.

Petitioner's argument is accordingly best symbolized by the case of Paul Pratt's fellow employee, Leroy Egan, who was also injured in the same explosion. As stated above, Leroy Egan filed his case in Ohio state court. The case was based on identical theories of liabilities. There was one important difference. The *Egan* jury was instructed under the current law according to *Van Fossen* v. *Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 522 N.E.2d 489 (1988); *Pariseau* v. *Wedge Products, Inc.*, 36 Ohio St. 3d 124, 522 N.E.2d 511 (1988); *Kunkler* v. *Goodyear Tire & Rubber Co.*, 36 Ohio St. 3d 135, 522 N.E. 2d 477 (1985), and reached the opposite result from that hypothecated by the Sixth Circuit in *Pratt*, i.e. that Quantum had not committed an intentional tort.[6]

Based on current Ohio law, the instructions upon which the *Pratt* jury decided this case are plainly wrong. No trial court using Ohio law can be justified in giving the *Pratt* jury

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[6] The Sixth Circuit's abrogation of its responsibility is further highlighted by the prior appeal in this case. Quantum had previously obtained summary judgment in its favor in the district court. While Respondent's appeal was pending before the Sixth Circuit, the Ohio Supreme Court changed the law in *Jones* v. *VIP Development Co.*, *supra*. The Sixth Circuit strictly adhered to *Jones*, reversed the summary judgment and remanded the case for further proceedings. In this appeal, though, when the Ohio Supreme court again changed Ohio law in *Van Fossen*, *Parriseau* and *Kunkler*, the Sixth Circuit refused to remand but instead took it upon itself to speculate as to how a jury would decide the case under the new Ohio standard.

charge in light of the decision in *Van Fossen* v. *Babcock & Wilcox Co.*, *supra*. *Van Fossen* involved an employee who was seriously injured on the job and claimed his employer was liable in damages for an intentional tort. The court in *Van Fossen* noted the prior holdings of Ohio's courts that had "created a confusing status of the law of Ohio." *Id.* at 109. The court then gave a thoughtful, historical analysis of the manner by which an employee in Ohio could recover for injuries received in the workplace. The *Van Fossen* court commented:

> Nebulous as this area might be to define, we must attempt to provide guidance in making the legal distinction between the theory of 'substantial certainty', as inferred intent, and the negligence of the employer. The tort that we strive to shine some light upon is, in the application of the Restatement, somewhat less than the deliberate assault on an employee by an employee, but more than the grossly negligent or reckless act of an employer which occasions an injury to the employee.

Van Fossen, 36 Ohio St. 3d at 114-15.

Further, the court in *Van Fossen* stated that after the Ohio Supreme Court's determination in *Jones* v. *VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984), which found that an intentional tort should be measured by a 'substantially certain to occur test', "trial courts have been led to misconstrue such phrase, transforming negligence cases into intentional tort cases." *Van Fossen*, 36 Ohio St. 3d at 115. *Van Fossen* advances the notion that the circumstances of the injury must be "plainly beyond anything the legislature could have contemplated" as entitling coverage under the workers' compensation statute. *Id.* at 116.

The most critical change wrought by *Van Fossen* is the rejection of "failure to warn" as constituting an intentional tort. The court cautioned as follows:

> There are many acts within the business or manufactur-

> ing process which involve the existence of dangers, where management fails to take corrective action, institute safety measures, or properly warn the employees of the risks involved. Such conduct may be characterized as gross negligence or wantonness on the part of the employer. However, in view of the overall purposes of our Workers' Compensation Act, such conduct should not be classified as an intentional tort. . . .

Id. at 117. Even though failure to warn evidence, as a matter of law, may not be used to prove an intentional tort, the District Court in *Pratt* used the following instruction:

> [a] defendant who fails to warn of a known defect or hazard which poses a grave threat of injury may reasonably be considered to have acted, despite a belief that harm is substantially certain to occur.

(*Pratt*, Tr. pp. 769-70).

The Sixth Circuit then allowed the verdict to stand even though the jury had been wrongly instructed to infer *intent* from *negligence* evidence. The Sixth Circuit in *Pratt* held:

> We therefore believe that plaintiff has presented sufficient evidence that a reasonable jury could find that defendant's acts, including but not limited to its failure to warn, constituted an intentional tort.

853 F.2d at 1339.

The jury in *Pratt* was instructed that a sufficient basis to find Quantum liable for an intentional tort would be the failure by Quantum to adequately warn its employees of a known hazard. Since Ohio law now removes failure to warn as an element of intent, the *Pratt* jury could have erroneously found Quantum had committed an intentional tort based on what is now held to be a negligent act.

Van Fossen has also wrought other important changes to the interpretation of intentional torts in the workplace. *Van*

Fossen states that it is *now* interpreting *Jones* to *require knowledge* as a "vital element of the requisite intent."[7] *Van Fossen*, 36 Ohio St. 3d at 116.

Van Fossen sumarizes that, by the enunciated test of proof of actual or subjective intent as above, the aim of the court is to "significantly limit the areas within which 'intent' on the part of the actor may be circumstantially *inferred.*" *Id.* at 117. (emphasis in original) The court in *Van Fossen* therefore lays out the more difficult standard that must be satisfied in order to prove an intentional tort. *Van Fossen* has rejected failure to warn and high risk as elements of intentional tort, and has added the requirement of "knowledge" on the part of the employer.

Decided the same day as *Van Fossen* was the case of *Pariseau* v. *Wedge Products, Inc., supra.* The issue in that case similarly involved a determination as to whether the employer was merely negligent or had committed an intentional tort. The court in *Pariseau* stated that the court's prior decision in *Jones* v. *VIP Development* left questions open in understanding the standard of intentional tort, *Id.* at 128, and referred to the *Van Fossen* court's "exhaustive and scholarly analysis" of the issue. *Id.* at 129, n.6.

The third intentional tort case decided the same day by the Ohio Supreme Court was *Kunkler* v. *Goodyear Tire & Rubber Co., supra.* As in *Van Fossen* and *Pariseau*, the court in

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[7] The *Van Fossen* court establishes that the following must be demonstrated:

> (1) Knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within his business operation; (2) knowledge by the employer that if employees are required by virtue of their employment to be subjected to such dangerous process, procedure, instrumentality or condition, then harm to them would be a substantial certainty, and not just a high risk; (3) that the employer, under such circumstances, and within such knowledge, did act to so require the employee to continue performing his employment tasks.

Id. at 116.

Kunkler commented upon the previous confusion that existed in the workplace concerning a claim for intentional tort and warned that courts have been finding intentional wrong where only negligence lies. *Id.* at 138-39. Justice Wright, in concurrence, urged close attention to the recent companion cases of *Van Fossen* and *Pariseau* and to the difference these cases make in terms of the "incomplete and misapplied" *Jones* decision. *Id.* at 140, n.5.

The Sixth Circuit failed to heed the clear message of the Ohio Supreme Court that the law had changed and, moreover, that future courts should follow the new approach in this area. The Sixth Circuit in *Pratt* instead gave only lip service to these recent Ohio Cases even though *Pratt* conceded that failure to warn could no longer be classified as an intentional tort and that one of the most important elements of *Van Fossen* was that it "restricted the areas within which intent may be inferred." *Id.* at 119. It is this very type of manufacturing accident, covered by workers compensation, that the Ohio Supreme Court cautioned should not be transformed into an intentional tort case.

Following *Vandenbark*, the Sixth Circuit should have remanded the issue to the trial court when faced with a change in relevant state law during the pendency of the appeal. *See Moorehead* v. *Mitsubishi Aircraft Int'l., Inc.*, 828 F.2d 278, 289 (5th Cir. 1987) (involving a remand when recent state law showed a strong intention to abandon all artificial restrictions on mental anquish recovery.)

CONCLUSION

By seizing the jury's function, the court in *Pratt* has violated the defendant's right to a trial by jury. The Sixth Circuit's decision is in conflict with state law at the time it rendered its decision. It is the obligation of the federal courts sitting in diversity to allow a proper adjudication according to state law and to remand the case and give the jury the opportunity to determine the defendant's intent as the trier of fact. This court accordingly should issue a writ of certiorari to review and reverse the decision of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-3971/3972

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA L. PRATT,
Plaintiff-Appellee,
Cross-Appellant,

v.

NATIONAL DISTILLERS & CHEMICAL CORPORATION,
Defendant-Appellant,
Cross-Appellee.

On Appeal from the United States District Court for the Southern District of Ohio.

Decided and Filed August 1, 1988

Before: KEITH and MILBURN, Circuit Judges; and EDWARDS, Senior Circuit Judge.

KEITH, Circuit Judge: Defendant National Distiller & Chemical Corporation, d/b/a Emery Industries ("Emery"), appeals and plaintiff Patricia Pratt cross-appeals the judgment notwithstanding the verdict for defendant on the issue of damages. For the reasons set forth below, we **REVERSE** the

district court's judgment *n.o.v.*, and **REINSTATE** plaintiff's damages award, with costs and interest. We **AFFIRM** the liability portion of the verdict below.

I.

PROCEDURAL HISTORY

This diversity action is based on Ohio law. Mrs. Pratt brought suit in the United States District Court. Southern District of Ohio, to recover compensatory and punitive damages for injuries to, and the death of, her husband, Paul Pratt. On February 18, 1982. Mr. Pratt sustained second and third degree burns over eighty percent of his body and incurred various shrapnel injuries in an explosion and flash fire at Emery's chemical plant. Mr. Pratt died after surviving for thirty-seven days in the burns unit of Cincinnati Medical Center.

The jury trial was bifurcated on the issues of liability and damages. The liability phase began on January 6, 1986. On the third day, a mistrial was declared,[1] and the trial began again on February 10, 1986. The liability phase of the retrial resulted in a verdict for plaintiff. The damages phase began on March 3, 1986, and resulted in a verdict for plaintiff on March 5, 1986, in the amount of $1,003,028 in compensatory damages and $100,000 in punitive damages. After the verdict was rendered, but while post trial motions were pending, the Ohio legislature passed a new workers' compensation statute. Ohio Rev. Code Ann. § 4121.80, which relegates to a newly-created Ohio Industrial Commission all damages determinations in intentional tort actions between employers and employees.[2]

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[1] A mistrial was declared because the trial court had excluded certain of plaintiff's evidence relating to fumes which sometimes emanated from the defendant's filter presses. The trial judge found that the existence of fumes related to defendant's knowledge of an explosion hazard, and that the evidence was therefore admissible.

[2] Ohio Rev. Code Ann. § 4121.80(D) (Page's 1986 Supp.).

That statute became effective on August 22, 1986. On September 19, 1986, the trial court below vacated Mrs. Pratt's damages award and referred her damages determination to the Ohio Industrial Commission, pursuant to the new statute.

On October 20, 1986, plaintiff and defendant each filed a timely appeal. By agreement of the parties, defendant was designated as appellant, and plaintiff was designated as appellee/cross-appellant.

II.

FACTS

Defendant Emery operates a chemical manufacturing plant in Cincinnati. On February 18, 1982, a chemical press exploded, eventually resulting in the death of Paul Pratt, plaintiff's husband. The chemical that was under manufacture at the time is called "9058," a non-polymeric ester[3] used as a base material for plastics and other products. The primary danger in the manufacture of 9058 is that sodium chlorite, a chemical with explosive properties used as an industrial bleach, must be used to bleach the 9058 in order to yield the necessary product color.

On the morning of the explosion that killed plaintiff's husband, sodium chlorite had accumulated in a filter press. Following Emery's procedures, Mr. Pratt's co-worker, Leroy Egan, began blowing air into the filter press to dry the insides of the press so that it could be opened up to scrape the chemicals and impurities that had collected from the filtering plates. Mr. Egan noticed that steam began blowing from the spigots at the bottom of the filter press. He called to Mr. Pratt for assistance in ascertaining the problem. Mr. Pratt and Mr. Egan stood directly in front of the filtering machine, observing the steam spew from the spigots for approximately two and

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[3] An "ester" is a combination of alcohol and acid, which react together to form a viscous synthetic liquid. The ester 9058 is used in plastics as a "plasticizer," imparting flexibility and resiliency to plastics.

one-half minutes. Suddenly, the steam turned to dark smoke and the filter press exploded into pieces. A flash fire enveloped the workers, severely injuring them both.

The parties agree that the sodium chlorite/ester combination was in the filter press due to the omissions of the operator responsible for treating the 9058. The operator failed to add a sufficient amount of mono-sodium phosphate ("MSP") to break down the chlorite build-up and then failed to add a full 6,000-pound water wash to remove the unreacted sodium chlorite from the filter press.

Plaintiff introduced evidence to show that Emery's upper management knew of the explosion hazard of combining sodium chlorite with an ester in a filter press. For example, plaintiff's documents disclosed that several explosions and fires had occurred in the chemical plant when sodium chlorite and an ester combined in a filter press.[4] Reports of these explosions were circulated throughout Emery's upper management. Management investigators recommended that safety tests be developed to check for the presence of sodium chlorite before esters are allowed to enter filter presses. In mid-1980, Emery developed a chlorite safety test for all esters, stating that it was imperative to run the test on all chlorite-bleached esters because of the known explosion hazard. Several of the company's directors admitted to knowledge of prior explosions and hypothesized that operators would be injured if in the vicinity of such an explosion.

Mrs. Pratt also alleges that Emery's management never told the workers in the plant about the explosion and fire hazard. Emery did warn employees that sodium chlorite was a power-

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[4] Explosions occurred in 1973, 1974, 1978 and 1980, after an insufficient amount of MSP was added to break down the sodium chlorite when an ester was introduced into the filter press. In the 1973, 1974 and 1980 explosions, chlorite was combined with a "polymeric" ester, which cannot sustain the water wash normally used on a "non-polymeric" ester like 9058. Presumably, then, the dangers associated with explosions are greater with polymeric esters, where the safety water wash cannot be used to eliminate the sodium chlorite build-up.

ful "oxidizing agent" and should be kept away from combustible materials such as rags and paper. Two of Emery's officials admitted at trial that there is no reference to "explosion" in the manufacturing procedures given to the workers. Plaintiff introduced testimony that the workers did not understand that the caution referring to sodium chlorite as an "oxidizing agent" was in any way related to an explosion hazard and were not aware of the explosion problem. The only specific hazard Emery ever disclosed to the workers was that if sodium chlorite entered a filter press, the workers might be exposed to toxic fumes. The procedures did, however, contain inexplicit warnings such as, "residual chlorite can cause a hazardous situation while pressing."

Emery's area supervisor, Mr. Feinauer, admitted that nothing in Emery's procedures indicated to the workers that there was a potential for explosion with sodium chlorite. Mr. Feinauer stated that he believed that the "hazardous situation while pressing" caution referred only to toxic fumes emanating from the presses. In his accident report for Emery on the explosion in this case, Mr. Feinauer indicated that "lack of hazard awareness" was a cause of the explosion.

Mrs. Pratt also introduced evidence that Emery "intentionally concealed" the explosion hazard from the workers. Her evidence consisted of testimony and documents indicating that a new refining process was developed for 9058 which required a "drying procedure," instead of the usual water wash. While this drying process eliminated the product loss often accompanying a water wash, it produced toxic chlorine fumes and did not remove sodium chlorite from the 9058. Emery's technical manager, Mr. Price, explicitly assured the workers that the drying procedure and the resulting fumes were "safe," even though Mr. Price knew about the explosion problem. In late 1980, in response to operator complaints about breathing fumes, Emery reinstated the water wash procedure for all batches of 9058.

Plaintiff's evidence included memoranda which revealed that tests had been performed by Emery researchers and technicians on the properties of sodium chlorite, the dangers

involved in the drying procedure, and the causes of past explosions. Certain of these memoranda were circulated through upper management at Emery, but no information concerning the hazards ever reached the workers; rather, the employees continued to labor under the illusion that the filter presses were safe.

Finally, plaintiff's evidence also suggested that Emery's procedures were not safe because employees were "guessing" at the amounts of MSP and water to add during the treatment process. Emery had provided no method for workers to measure the precise levels of MSP or water needed to remove sodium chlorite from the 9058. The potential for hazard was therefore great, especially because workers apparently had no knowledge of the dangers inherent in their measuring guesswork.

III.
DISCUSSION

Defendant Emery is appealing only the liability portion of the verdict and the punitive damages award and urges this court to consider the appeal in light of the new statute, Ohio Rev. Code Ann. § 4121.80. Emery asks that this court either reverse the liability judgment below or grant a new trial. On cross-appeal, Mrs. Pratt asks that we reverse the judgment *n.o.v.* granted by the district court and reinstate her damages award. She argues that application of the new statute to extinguish her judgment is a violation of Ohio's constitutional prohibition against retroactive legislation. In its order for a judgment *n.o.v.*, the court below did not address the constitutionality of the retroactive application of the statute to Mrs. Pratt's judgment.

Apart from the main issue of whether § 4121.80 can be applied retroactively to this action, both parties appeal a host of additional issues. Emery argues that Mrs. Pratt has not established a *prima facie* case of intentional tort against Emery; that Emery's liability cannot raise under a "failure to warn" theory; that a self-insured employer such as Emery can-

not be liable for items that the employer has already directly compensated the plaintiff for under workers' compensation; and that punitive damages were improperly awarded. Mrs. Pratt also raises several additional arguments on appeal;[5] however, since we decide here to reverse the district court's decision to refer Mrs. Pratt's damages award to the Ohio Industrial Commission, we need not reach her other issues.

A. *Retroactive Application of § 4121.80*

The question of whether § 4121.80 applies retroactively to this action is the crux of both sides' appeals. The new statute dramatically alters Ohio common law with respect to intentional tort claims between employers and employees in several ways: it limits the amount of damages a plaintiff may recover; it takes the damage determination away from a jury and places it in the province of the Ohio Industrial Commission, a body that decides the amount of the award and pays the plaintiff from a common "intentional tort fund"; and it eliminates the right to recover punitive damages. In addition, the statute defines and codifies the meaning of "intentional tort":

> "Intentional tort" is an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur.
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> * * *

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[5] Plaintiff's additional arguments are: whether application of the new statute to her judgment is a violation of the due process clause of the United States Constitution; whether it was prejudicial error for the court to refuse to instruct the jury on safety requirements imposed on the employer by law; whether it was prejudicial error for the court to exclude plaintiff's evidence of defendant's refusal to provide available safety devices; whether it was prejudicial error for the court to limit the number of plaintiff's expert witnesses at trial to three; whether it was prejudicial for the court to instruct the jury that it could consider punitive damages only in regard to plaintiff's personal injury claim, and not in regard to the wrongful death claim; and whether it was prejudicial error for the court to comment to the jury on the instructions in a manner that supported defendant's closing arguments.

> "Substantially certain" means that an employer acts with deliberate intent to cause an employer to suffer injury, disease, condition, or death.

Ohio Rev. Code Ann. § 4121.80(G)(1).

As mentioned above, the statute was enacted after the entry of the jury award in this case, but while post trial motions were under consideration. Defendant argues that this court must apply current Ohio law (the new statute) while the case is on appeal, especially given the Ohio legislature's clear intent when enacting the statute:

> This section applies to and governs any action based upon a claim that an employer committed an intentional tort against an employee *pending in any court* on the effective date of this section and all claims or actions filed on or after the effective date, notwithstanding any provisions of any prior statute or rule of law of this state.

Section 4121.80(H) (emphasis supplied). Since this case was "pending" both now and on the effective date of the statute, defendant argues, this court must review the appeal in light of the new law. Indeed, this circuit has held that a court of appeals sitting in diversity must apply the law of the state as existing at the time of its decision rather than as it stood at the time the case was decided in district court. *Awrey v. Progressive Casualty Insurance Co.*, 728 F.2d 352, 354 (6th Cir. 1984), *cert. denied*, 474 U.S. 920 (1985).

We disagree with Emery's claim. We believe that when applied to this case, the new Ohio statute violates § 28, Article II of the Ohio Constitution.[6] The new statute, which applies to

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[6] Our analysis does not abolish this circuit's existing rule under *Awrey* that a court must apply the law of the state as it now stands, rather than as it stood at the time the case was decided in the district court. *Awrey's* reach extends only as far as the Ohio Constitution permits. As a result, it can only apply to legislation that is not substantive in nature and therefore not in violation of Ohio's prohibition against retroactive legislation.

all cases "pending" on its effective date (August 22, 1986), is in conflict with Article II, § 28 of Ohio's Constitution, which provides that "[t]he General Assembly shall have no power to pass retroactive laws . . . ." *See United States v. McGee*, 714 F.2d 607, 611 (6th Cir. 1983); *Perk v. City of Euclid*, 17 Ohio St. 2d 4, 244 N.E.2d 475 (1969).

In *Gregory v. Flowers*, 32 Ohio St. 2d 48, 53, 290 N.E.2d 181, 184 (1972), the Ohio Supreme Court stated that the state's constitutional ban against retroactive legislation is applicable solely to laws which are substantive — not procedural-remedial — in nature. *See also Wilfong v. Batdorf*, 6 Ohio St. 3d 100, 103-104, 451 N.E.2d 1185, 1188-89 (1983). Procedural or remedial laws are those "providing rules of practice, courses of procedure or methods of review," or those "prescrib[ing] methods of enforcement of rights or obtaining redress." *French v. Dwiggins*, 9 Ohio St. 3d 32, 33, 458 N.E.2d 827, 829 (1984). *See also Kiser v. Coleman*, 28 Ohio St. 3d 259, 242 N.E.2d 658 (1986); *Kilbreath v. Rudy*, 16 Ohio St. 2d 70, 242 N.E.2d 658 (1968). Laws affecting substantive rights are those which create duties, rights and obligations. *State ex. rel. Holdrige v. Industrial Comm'n.*, 11 Ohio St. 2d 175, 178, 228 N.E.2d 621, 623 (1967). Thus, if the new law is found to be remedial or procedural in nature, the court should apply it to this action. If, on the other hand, § 4121.80 has a *substantive* impact — which we believe it has — then the court should not apply it retroactively to this case.

A federal court of appeals in diversity must apply the law of the forum state. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). While this case was on appeal in this court, the Ohio Supreme Court decided four cases which conclusively resolved the retrospectivity question as applied to § 4121.80. In *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio St. 3d 135, 522 N.E.2d 477 (1988), *Van Fossen v. Babcock & Wilcox Co.* 36 Ohio St. 3d 100, 522 N.E. 2d 489 (1988), and *Pariseau v. Wedge Products, Inc.*, 36 Ohio St. 3d 124, 522 N.E.2d 511 (1988), that court held that the application of § 4121.80 to pending claims disturbs a substantive right, and therefore is violative of § 28, Article II of the Ohio Constitution.

In *Van Fossen*, the Ohio Supreme Court held that, if applied to actions accruing prior to the new statute's effective date, § 4121.80 would disturb a plaintiff's right to rely upon the common law definition of "intentional tort" as established in Ohio under *Jones v. VIP Development Corp.* 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984). Prior to the enactment of § 4121.80, Ohio's definition of "intentional tort" was set out in *Jones* as "an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur." *Id.* at 95, 472 N.E.2d at 1051. Section 4121.80 adopts that definition, but adds that " 'substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition or death." § 4121.80(G)(1). According to *Jones*, the employer must have known or believed that his actions were substantially certain to result in the harm to an employee before the intent to injure would have been inferred. The employer's intent, wrote the *Jones* court, "may be inferred from his conduct and surrounding circumstances." *Id.* at 95, 472 N.E.2d at 1051. Thus, specific intent to injure was not required under *Jones* for a finding of intentional misconduct.

Under § 4121.80(G)(1), however, only the employer who acts with "deliberate intent" to cause the act which results in injury, knowing that his intentional conduct will be substantially certain to cause injury, commits an "intentional tort." The statute therefore requires direct proof of substantially certain conduct, removing the inference permitted under *Jones*. This change in the common law definition places a more onerous burden on plaintiffs to demonstrate a deliberate intent to cause injury. As the Ohio Supreme Court held in *Van Fossen*, 36 Ohio St. 3d at 109, 522 N.E. 2d at 498:

> R.C. 4121.80(G)(1) would remove appellees' potentially viable, court-enunciated cause of action by imposing a new, more difficult statutory restriction upon appellees' ability to bring the instant action. We therefore hold that this result constitutes a limitation, or denial of, a substantive right, and consequently causes the statute to fall

within the ban against retroactive laws established by Section 28, Article II of the Ohio Constitution.

See Also Kunkler v. Goodyear Tire & Rubber Co., 36 Ohio St. 135, 138, 522 N.E. 2d 477, 480 (1988). Thus, since this is a diversity case and we must defer to Ohio law, we conclude that § 4121.80 was impermissably applied to Mrs. Pratt's action.

Even though the *Van Fossen*, *Pariseau* and *Kunkler* cases make it abundantly clear that § 4121.80 may not be applied retroactively to cases pending on the statute's effective date, one might argue that those cases dealt only with the change in the definition of an intentional tort. In this case, the district court affirmed the liability verdict. An argument could be made, therefore, that if the provisions of the new statute were separately passed out, the portion of the statute assigning damages to the Ohio Industrial Commission would be considered remedial in nature, even though the change in definition of intentional tort was held to be substantive. This distinction is relevant to this case, where the damages verdict is under the challenge.

We are fully cognizant of the definitional mire associated with labeling rights as "procedural" or "substantive." These two categories are not rigid boxes, but are subtle and fluid, and depend upon the circumstances of individual cases. Although we acknowledge this definitional awkwardness, Ohio law makes it clear that the damages provision of the new statute affects a second substantive right relevant to this appeal — Mrs. Pratt's right to a trial by jury.

Section 4121.80 affects the right to a jury trial by assigning the damages determination to the Ohio Industrial Commission, snatching the decision from the province of the jury. The right to a jury trial under Ohio law has been held to be a fundamental, substantial right and not merely a question of procedure. *Cleveland Ry. Co. v. Halliday*, 127 Ohio St. 278, 283-84, 188 N.E. 1, 3 (1933):

[T]he right to a jury trial does not involve merely a ques-

> tion or procedure. The right to jury trial derives from Magna Carta. It is reasserted both in the Constitution of the United States and in the State of Ohio. For centuries it has been held that the right of trial by jury is a fundamental constitutional right, a substantial right, and not a procedural privilege. (citations omitted).

See also Freels v. Dayton Electroplate, Inc., No. 85-2031, slip op. at 8 (Ohio Com. Pl. Ct. Jan 1, 1987) (right to jury trial substantive right under Ohio law; § 4121.80 therefore unconstitutional as applied); *Quick v. Sun Refining & Marketing Co.*, No. 820292, slip op. at 3 (Ohio Com. Pl. Ct. Dec. 3, 1986) (same); *Meadors v. Zaring Co.*, No. A-8503907, slip op. at 10 (Ohio Com. Pl. Ct. Oct. 6, 1986), *aff'd*, No. C-860622 (Ohio Ct. of Appeals Oct. 7, 1987) (same).

At the time the filter press exploded, at the time Mrs. Pratt filed her complaint, and at the time the jury rendered its verdict, there was a common law right in Ohio for an employee to obtain money damages for an intentional tort occurring in the workplace and to have a jury determine the amount of damages. Under Ohio law, a statute which eradicates a vested right "acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions already passed *must be deemed retrospective.*" *Perk v. City of Euclid*, 17 Ohio St. 2d 4, 8, 244 N.E.2d 475, 477 (1969). *See also Weil v. Taxicabs of Cincinnati*, 139 Ohio St. 198, 39 N.E.2d 148 (1942).

In *Weil*, the Ohio Supreme Court held that a statutory amendment which impairs a common law right of action — even though the statute substitutes a new right to compensation — deals with a vested substantive right, not a remedial right. Such a statute is therefore within the purview of Ohio's constitutional prohibition against the legislative enactment of retroactive laws. In this case, as in *Weil*, the Ohio General Assembly transformed plaintiff's common law right of a trial to a court and jury into a limited determination of part of the claim before a court, followed by an administrative determination of damages. As noted in *Kneisley v. Latimer-Stevens*

Co., No. 86AP-1046 (Ohio Ct. of Appeals Aug. 4, 1987) slip op. at 3, "[t]hat type of change is substantive, and cannot be accomplished retroactively."

Thus, § 4121.80 affects two substantive rights: the right to the common law definition of an intentional tort and the right to a jury trial. We therefore reverse the district court's judgment notwithstanding the verdict on this issue and reinstate Mrs. Pratt's damages award.

B. ***Sufficiency of Proof of Hazard***

Defendant Emery next argues that plaintiff cannot establish a *prima facie* case of intentional tort without presenting evidence of a hazard in the procedure involved in the accident. Even though we hold that the new statute is not applicable to this action, Emery urges that under Ohio's previous common law (articulated in *Jones v. VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984) and clarified in *Van Fossen*, 36 Ohio St. 3d at 116, 522 N.E.2d at 498, Mrs. Pratt failed to present sufficient evidence to prove an intentional tort. As stated above, *Jones* required proof that an injury was substantially certain to occur and that the employer believed that its act was substantially certain to cause injury. *Jones*, 15 Ohio St. 3d at 95, 472 N.E.2d at 1051. *Van Fossen* further clarified this standard, holding that:

> [T]he following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within his business operation; (2) knowledge by the employer that if employees are required by virtue of their employment to be subjected to such dangerous process, procedure, instrumentality or condition, then harm to them would be a substantial certainty, and not just a high risk; (3) that the employer, under such circumstances, and with such knowledge, did act to so require the employee to continue performing his employment tasks.

36 Ohio St. 3d at 116, 522 N.E.2d at 504.

We believe that Mrs. Pratt presented sufficient proof from which a jury might infer that Emery's procedures were hazardous and that defendant committed an intentional tort.

The jury was asked whether Emery knew an explosion was substantially certain to occur in view of evidence of past explosions, and in view of evidence that Emery was aware that the workers were kept ignorant of any explosion hazard. Plaintiff also introduced testimony that Emery knew that the workers were guessing at the amounts of water and chemicals they added during the treatment procedures. Mrs. Pratt contends, and the jury apparently believed, that no procedure is safe if the persons using the procedure are kept ignorant of the explosive properties of a component chemical. The hazard was in the ignorance of the employees, and in the inability of the employees to follow procedures precisely. Evidence suggested that defendant knew about the problem of imprecision and guessing. Thus, the jury could have found that employee ignorance combined with imprecise methods and hazardous chemicals presented sufficient evidence of a hazard in the procedure involved in the accident. There was evidence to show that the employer knew of the hazard, knew that the employees were exposed to risk, and acted to require the employees to continue performing their tasks. Thus, under the *Jones* "substantial certainty" test, or under the more precise *Van Fossen* "knowledge" test, the reasonable juror could have found the requisite intent.

As the Ohio Supreme Court held in one of the consolidated cases comprising the *Jones* decision. *Gains v. City of Painesville*, a reviewing court should not lightly overturn a jury verdict: "A reviewing court should be particularly loathe to disturb a jury's findings on an issue, such as intent, which is so intimately bound to the interpretation of facts and the demeanor of witnesses." *Id.* at 96-97, 472 N.E.2d at 1052. This court has expressed the same hesitation toward tampering with jury findings. *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) (to overturn a jury verdict, evidence must be such that "reasonable minds could not differ as to the conclusions to be drawn from

the evidence"). We are not to reweigh evidence to reach our own conclusions about the correctness of a jury's decision; our task is simply to determine whether reasonable jurors could, under any theory submitted to them, have resolved the dispute as they did. *Thompson v. Bass*, 616 F.2d 1259, 1267 (5th Cir.), *cert. denied*, 449 U.S. 983 (1980).

Thus, after reviewing the evidence and in deference to these admonitions, we affirm the jury verdict on this issue.

C. *Failure to Warn Instruction*

Defendant's next argument is primarily an objection to a sentence in the jury instructions, drawn from the *Jones* case, which stated: "A defendant who fails to warn of a known defect or hazard which poses a grave threat of injury may reasonably be considered to have acted despite a belief that harm is substantially certain to occur." Emery argues that a failure to warn cannot give rise to the knowledge requirement in an intentional tort under *Van Fossen*.

The Supreme Court in *Jones* had held that "[t]he existence of this knowledge or intent on the part of the actor may be inferred from his conduct and surrounding circumstances." 15 Ohio St. 3d at 95, 472 N.E.2d at 1051. In *Van Fossen*, that court sought significantly to "limit the areas within which 'intent' on the part of the actor may be circumstantially *inferred*." *Van Fossen*, 36 Ohio St. 3d at 117, 522 N.E.2d at 504 (emphasis in original). Indeed, the *Van Fossen* court went on to explain that a "failure to warn," in and of itself, was not sufficient to prove intent:

> There are many acts within the business or manufacturing process which involve the existence of dangers, where management fails to take corrective action, institute safety measures, or properly warn the employees of the risks involved. Such conduct may be characterized as gross negligence or wantoness on the part of the employer. However, in view of the overall purposes of our Workers' Compensation Act, such conduct should not be classified

> as "intentional tort" and therefore an exception, under *Blankenship* or *Jones*, to exclusivity of the Act.

Id. There is little question then, given the *Van Fossen* admonition, that a case predicated solely upon an employer's failure to warn employees of a danger would not demonstate the requisite intent. The jury instruction given in this case, if it was undergirded only by a failure to warn theory, would contravene the *Van Fossen* rule. "Failure to warn," however, was not the sole theory in plaintiff's case. The crux of plaintiff's argument was not simply that the employer did not tell the employees about the dangers, but that the employer *knew* that an accident was substantially certain to occur, *knew* that employees were improperly combining explosive chemicals, and in spite of this knowledge, sanctioned the activity by allowing it to continue. The sentence regarding a failure to warn could have been viewed by the jurors as but one brick in the house of evidence presented against the defendants, as but one of the surrounding circumstances from which intent might reasonably have been inferred.

Moreover, the jury instruction, taken in context, clearly announced the requirement that the actor *know* that his or her actions were substantially certain to cause injury and that "negligence" or "recklessness" did not amount to an "intentional wrong."

The jury instructions, as a whole, were firmly consistent with the *Van Fossen* rule. We quote at length to provide the context:

> The concept that permeates this case upon which this case is based is the phrase "intentional tort." A tort, by the way, is a civil wrong. An intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur, not merely likely. An intent to injure a specific person is not required.
>
> A defendant who fails to warn of a known defect or hazard which poses a grave threat of injury may reason-

ably be considered to have acted, despite a belief that harm is substantially certain to occur.

You will note that the intentional tort concept has two different avenues. But in this case, there is only one. I do instruct you that there has been no evidence presented of an intent to injure.

That leaves us with the phrase, "substantially certain." That phrase is to be given its ordinary and usual meaning. It is more than likelihood. Substantial means about, or nearly, almost, essentially or virtually, and certain. Included among the definitions of certain are "sure" and "inevitable." The term "substantially certain" may be restated as "virtually sure" or "nearly inevitable."

Observe, ladies and gentlemen it is not enough for the plaintiff to prove that Emery Industries was negligent. We do not deal in this case with negligence.

Negligence is a failure to use ordinary care. Ordinary care is the care that a reasonably prudent person would use under the same or similar circumstances. But it's the element of substantial certainty which distinguishes a negligent act from intentionally tortious conduct.

Where a defendant acts despite his knowledge that risk is appreciable, his conduct is negligent. Where the risk is great, his actions may be characterized as reckless or wanton, but that is not an intentional wrong. The actor must know or believe that harm is a substantially certain consequences [sic] *of his act before an intent to injure will be inferred.*

The existence of this knowledge or intent on the part of the actor may be inferred from his conduct and surrounding circumstances.

Ladies and gentlemen, the same knowledge and appreciation of a risk, something short of substantial certainty, is not intent.

> The plaintiff must establish by a preponderance of the evidence that the death of Paul W. Pratt was caused by an intentional tort.

Joint Appendix 1244-45 (emphasis supplied).

A jury could have inferred from the evidence of Emery's knowledge of the danger, its failure to specifically warn its employees about the explosion hazard, and its knowledge about employees using imprecise procedures in combining chemicals, that Emery was acting with substantial certainty that harm would occur. *Van Fossen* did not completely prohibit the drawing of inferences from circumstantial evidence; it merely restricted the areas within which intent may be inferred. We do not believe that the facts of this case paint the same negligence scenario forbidden by the *Van Fossen* court.

We therefore believe that plaintiff has presented sufficient evidence that a reasonable jury could find that defendant's acts, including but not limited to its failure to warn, constituted an intentional tort.

D. *Set-Off for Workers' Compensation*

Defendant argues that it should be allowed to set off against the jury verdict the items it already paid to plaintiff through workers' compensation. Emery is self-insured. Emery contends that self-insured employers should be able to subtract workers' compensation payments from any jury verdict to avoid having to pay twice for the harm done. While defendant's argument appears equitable, the Ohio Supreme Court has not accommodated that viewpoint.

The trial judge in this case, relying on *Jones*, held that the employer was not entitled to a set-off for workers' compensation payments. In *Jones*, the Ohio Supreme Court specifically held: "An employer who has been held liable for an intentional tort is not entitled to a setoff of the award in the amount of workers' compensation benefits received by the employee or his representative." 15 Ohio St. 3d at 100, 472 N.E.2d at 1055.

The court explained that the compensation provided by the workers' compensation law " 'is in the nature of an occupational insurance, and, like general insurance, cannot be deducted and treated as an offset for claims for damages for wrongful death or injury.' " *Id.* at 100, 472 N.E.2d at 1055 (quoting *Trumbull Cliffs Furnace Co. v. Shachovsky*, 111 Ohio St. 791, 146 N.E. 306 (1924)).

This rule has been held applicable to self-insured employers as well. *Balyint v. Arkansas Best Freight System*, 18 Ohio St. 3d 126, 480 N.E.2d 417 (1985); *Formoso v. Plain Dealer Publishing Co.*, 18 Ohio St. 3d 138, 480 N.E.2d 426 (1985). Accordingly, we hold that defendant's argument is unsupported by case law and therefore lacks merit.

E. ***Punitive Damages***

Finally, defendant argues that punitive damages cannot be awarded in an intentional tort action where plaintiff has not proven any intent to injure. Again, this question falls within the province of the jury.

Under Ohio laws, Mrs. Pratt must prove that Emery acted with "actual malice" before the question of punitive damages may be submitted to the jury. Thus, Emery argues that only a showing of deliberate intent to injure will support an award of punitive damages. This position is directly contrary to Ohio law, as recognized by this court in *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976), and by the Ohio Supreme Court in *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981). In *Leichtamer*, the court held:

> Actual malice may be inferred from conduct and surrounding circumstances. *Davis v. Tunison*, 168 Ohio St. 471 [, 155 N.E.2d 224 (1946)]. Moreover, intentional, reckless, wanton, willful and gross acts which cause injury to person or property may be insufficient to evidence that degree of malice required to support an award of punitive damages in tort actions.

The trial court in this case gave a clear instruction on the requirement of finding actual malice for punitive damages, stating that "[a]ctual malice means anger, hatred, ill will, a spirit of revenge or a reckless disregard of the consequences." Joint Appendix at 1273. We find that the trial court's instruction was a fair statement of the law and that the evidence as outlined above was sufficient to permit reasonable jurors to conclude that Emery knew that its operations posed a grave danger to the lives of its employees, and therefore that its failure adequately to warn employees and to modify its procedures was conduct sufficiently evidencing at least ill will or reckless disregard of the consequences. We conclude that the district court erred in granting the judgment *n.o.v.* on the issue of damages, both compensatory and punitive.

IV.

CONCLUSION

For the reasons stated above, we **reverse** the district court's grant of a judgment notwithstanding the verdict and reinstate plaintiff's compensatory and punitive damages awards, with costs and interest to be paid by defendant. We **affirm** the district court on all other issues.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-83-249

PATRICIA L. PRATT,

Plaintiff,

v.

NATIONAL DISTILLERS & CHEMICAL CORP.,
d.b.a. EMERY INDUSTRIES,

Defendant.

ORDER
(Filed September 19, 1986)

This matter is before the Court on the motions of defendant National Distillers & Chemical Corporation (Emery) for Directed Verdict, Judgment Notwithstanding the Verdict, New Trial or for Remittitur (doc. no. 122), plaintiff's response to such motions (doc. no. 123) and defendant's reply thereto (doc. no. 124). Also before the Court are briefs of the parties on the issue of the applicability of the Ohio Revised Code § 4121.80 to this matter. (Doc. nos. 125, 126, 127, 128).

Plaintiff brought this Ohio-law-based diversity action in federal court claiming that defendant committed an intentional tort against its employee, Paul Pratt, which caused his injury and subsequent death. This matter first came to trial on January 6, 1986. On the third day of trial, the Court declared a mistrial. A second trial commenced on February 10, 1986 and continued for 10 days. On March 5, 1986, the jury rendered a verdict in favor of the plaintiff and assessed damages as follows: $1,003,028.00 compensatory and $100,000.00 punitive.

Subsequently, the Ohio legislature enacted Ohio Revised

Code § 4121.80, which became effective on August 24, 1986. This statute applies to "any action based upon a claim that an employer committed an intentional tort against an employee pending in any court on the effective date of this section. . . ." O.R.C. § 4121.80(H). Under Ohio law, a case is "pending" in a court if, as in the present case, the court has power to issue orders in it. 5 O. Jur. 2d, Assignments for Creditors § 72. While the Court expresses no opinion as to the constitutionality of O.R.C. § 4121.80, there is a presumption of validity that attaches to legislation passed by the General Assembly of Ohio. O.R.C. § 4121.80 is currently the law of Ohio and this Court sitting in a diversity action is bound to follow it.

Section 4121.80(D) limits the trial court to a "determination as to whether or not employer is liable for damages on the basis that the employer committed an intentional tort." In the present case, the trier of fact, that is the jury, after due deliberation, determined that Paul Pratt was injured and subsequently died as a result of an intentional tort committed by Emery.

Defendant urges the Court to overturn the jury's verdict on liability and either enter judgment for the defendant or, in the alternative, grant a new trial.

Upon reviewing motions for directed verdict or JNOV in diversity cases within the Sixth Circuit, the trial court must resolve questions of the sufficiency of the evidence by applying the relevant test under state law. *Moran* v. *Johns-Manville Sales Corp.*, 691 F.2d 811, 813 (6th Cir. 1982). Under Ohio law, an issue is within the province of the jury "when there is sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue. . . ." *O'Day* v. *Webb*, 29 Ohio St. 2d 215, 215, 280 N.E. 2d 896, 897 (1972). Accordingly, upon review of the record, the Court finds that sufficient evidence was presented for a reasonable jury to have decided this case as this jury decided it.

Defendant also argues trial error to support its motion for new trial. "The decision to grant or deny a new trial is one

'confided almost entirely to the exercise of discretion on the part of the trial court.' " *Moran* v. *Johns-Manville Sales Corp.*, 691 F.2d at 816 *quoting Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *see also Muhich* v. *Allen*, 603 F.2d 1247, 1253 (6th Cir. 1979). Upon review of the record, the court does not find such evidence of prejudicial error to warrant a new trial.

CONCLUSION

In accordance with Ohio Revised Code § 4121.80, the Court determines that the estate of Paul Pratt is entitled to an award under the statute and hereby commends this matter to the Ohio Industrial Commission for a determination of damages.

Defendant's motion for a new trial is hereby denied. Defendant's motion for directed verdict and JNOV insofar as they refer to the issue of liability are denied. Defendant's motion for JNOV regarding damages is granted and the judgment granting $1,103,028.00 in damages is hereby vacated pursuant to O.R.C. § 4121.80. Defendant's motion for remittitur is denied as moot.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3971/2

PATRICIA L. PRATT, SURVIVING SPOUSE AND ADMINISTRATRIX OF THE ESTATE OF PAUL W. PRATT, DECEASED,
Plaintiff-Appellee
Cross-Appellant,

v.

NATIONAL DISTILLERS AND CHEMICAL CORPORATION, d/b/a EMERY INDUSTRIES & CT CORPORATION,
Defendant-Appellant
Cross-Appellee.

ORDER
(Filed September 19, 1988)

BEFORE: KEITH and MILBURN, Circuit Judges and EDWARDS, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ LEONARD GREEN
Clerk

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE No. A-8301408

LEROY F. EGAN and CATHERINE S. EGAN,
Plaintiffs,

vs.

NATIONAL DISTILLERS AND CHEMICAL CORPORATION dba EMERY INDUSTRIES,
Defendant.

VERDICT FOR DEFENDANT
(Entered September 27, 1988)

We the jury being duly empaneled and sworn find in favor of the defendant, National Distillers and Chemical Corporation dba Emery Industries, against the plaintiffs, Leroy F. Egan and Catherine S. Egan.

At least 3/4th of our number that being 8 jurors does hereby concur in this verdict, and each of us so concurring does sign his or her name as follows:

/s/ Dale M. Dimmich
/s/ Donald F. Arp
/s/ Gerald C. Werner
/s/ Ann L. Buchas
/s/ John Mason
/s/ Josephine W. Porter
/s/ Gary Burns
/s/ Shandalor Tutora

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-8301408
(Judge Gorman)

LEROY F. AND CATHERINE EGAN,
Plaintiffs,

v.

NATIONAL DISTILLERS & CHEMICAL CORPORATION, d/b/a Emery Industries,
Defendant.

JUDGMENT ENTRY
(Entered November 2, 1988)

This action came on for trial before the Court and a duly empaneled jury on September 12, 1988, and the jury rendered its verdict for Defendant on September 27, 1988.

In conformity with the verdict of the jury, judgment is hereby entered for Defendant with costs to be paid by Plaintiffs.

ROBERT H. GORMAN, Judge

/s/ R. GUY TAFT
T-066
Trial Attorney for Plaintiffs

/s/ MARK A. VANDER LAAN
V-031
Trial Attorney for Defendant

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

United States Constitution, Seventh Amendment, in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.